UNAUTHORIZED ABSENCES

A Programmed Text

CRIMINAL LAW DEPARTMENT

The Judge Advocate General's School
United States Army
Charlottesville, Virginia
22903-1781

JA 301 **AUG 95**

INTRODUCTION

This is a programmed instructional text on unauthorized absence offenses. As a judge advocate, you must be familiar with this subject as it is both unique to military criminal practice and one of the most frequently encountered category of offenses.

Before you start this text, read Chapter 3, §§ I-V, Crimes & Defenses Deskbook, JA 337, and Manual for Courts-Martial, Part IV, paras. 9-11. Once you have read these materials, you are ready to begin.

Read each question carefully and select the best possible answer of those offered. Turn the page for the correct solution and an explanation of the teaching points involved. If you selected an incorrect choice, you should review the basic materials you studied as well as any cases which apply. After you've completed a question and answer, turn to the next question.

Remember: this is not an examination! You may use any materials that will assist you. Should you have a question concerning this subject, please do not hesitate to contact MAJ Barto in the Criminal Law Division.

At the conclusion of this exercise you should have a firm grasp of the fundamental concepts of unauthorized absence and related crimes.

If you have done your reading turn to the first question.

1. Absence without leave (AWOL) is a violation of which article of the Uniform Code of Military Justice (UCMJ)?

a. 87.

b. 85.

c. 86.

d. 105.

The correct answer is **c.** Article 85 is desertion. Article 87 is missing movement, and Article 105 is not even close. By process of elimination, or by diligent study, you should have selected Article 86 as the AWOL article of the UCMJ.

Reference: Art. 86, UCMJ; MCM, part IV, para. 10.

2. Which of the following is NOT an AWOL offense?

a. Failure to go to an appointed place of duty without authority.

b. Leaving a place of duty without authority.

c. Absence from a unit, organization, or place of duty without authority.

d. Feigning illness for the purpose of avoiding duty.

The correct answer is **d**. Take a quick look at Article 86, UCMJ. Feigning illness for the purpose of avoiding duty is an entirely separate offense under Article 115, UCMJ; it is a crime even if the incapacity does not result in absence from the unit or place of duty.

Reference: Art. 86; MCM, part IV, para. 10a.

3. The offense of failure to go to an appointed place of duty, in violation of Article 86(1), consists of three elements:

First, a certain authority appointed a certain time and place of duty for the accused;

Second, the accused knew that he or she was required to be present at the appointed time and place of duty;

AND Third [select one],

a. The accused, without proper authority, went from his or her appointed place of duty after having reported to that place.

b. The accused, without proper authority, failed to go to his or her appointed place of duty at the time prescribed.

The correct answer is **b**. This offense, usually known as "failure to repair", involves a failure to go TO a place of duty, usually a formation or a specific place where work is to be performed. A specific time and place must have been determined by proper authority, the accused must have been given adequate notice of his or her required attendance, and the accused must have failed to be there -- or failed to be there on time, without having been excused by proper authority.

Reference: MCM, part IV, para. 10b(1).

4. Private Smith, a member of 3d Platoon, Company C, 2d Battalion, 2d Brigade, 6th Infantry Division at Fort Benning, Georgia, was told by his first sergeant at 0755, 26 July 199X, to report immediately to the latrine on the third floor of his company's billet (building 156) for a cleaning detail. Alas, Smith did not go, and his failure to repair was referred to trial by court-martial. In the specification describing this violation of Article 86(1), Smith's appointed place of duty should be alleged as "fail to go at the time prescribed to his appointed place of duty, to wit:

_____

_____."

[Select one]:

a. "third floor latrine, building 156, Fort Benning, at 0800, 26 July 199X.

b. "latrine clean-up detail, building 156, Fort Benning at 0800, 26 July 199X."

c. "latrine, Company C, Fort Benning at 0800, 26 July 199X."

d. "first sergeant's detail, Company C, 2d Battalion, 2d Brigade, 6th Infantry Division, Fort Benning, Georgia at 0800, 26 July 199X."

The right answer is **a.** The appointed place of duty must be specific -- SPECIFIC -- a place that a reader of the specification could find with the information contained in the pleading. Answers b. and c. just refer to a latrine somewhere in the building or company area. How many latrines are there in the building or company area? Not specific enough! Answer d. does not describe a place at all, but just the general nature of the work and who assigned it. Look at United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975), to see how a prosecution was ruined by the failure to allege a specific place in an Article 86(1) case.

Reference: MCM, part IV, para. 10b(1).

5. A place and time of duty are not "appointed" in the sense of Article 86(1) and (2) unless -- [select best answer]:

a. the accused has actual knowledge of the order purporting to appoint such a time and place of duty.

b. the accused has constructive knowledge of the order purporting to appoint such a time and place of duty.

c. the accused has either actual or constructive knowledge of the order purporting to appoint such a time and place of duty.

The correct answer is a. The accused must actually know of the appointed time and place of duty. Actual knowledge could be gained, for example, by reading a unit bulletin board on which the duty assigned was posted. Actual knowledge may be proved by circumstantial evidence.

Reference: MCM, part IV, para. 10c(2).

6. The offense of leaving a place of duty consists of three elements. Which of the following is NOT an element of this Article 86(2) offense?

a. A certain authority appointed a certain time and place of duty for the accused.

b. The accused knew that he or she was required to be present at the appointed time and place of duty.

c. The accused without proper authority went from his or her appointed place of duty after having reported to that place.

d. The accused remained so absent until a certain time.

The correct answer is **d.** Choices a., b. and c. are elements of the offense. The gravamen of Article 86(2) is leaving a specific duty place without permission. How long you stay away is not part of the crime. Notice that in the military both arriving at duty late and leaving duty early are crimes. The maximum punishment for this offense and "failure to repair" is confinement for one month, reduction to the lowest enlisted grade, and forfeiture of 2/3 pay for one month.

Reference: MCM, part IV, para. 10b(2) and e(1).

Now let's consider Article 86(3) -- violation of which is usually referred to as AWOL.

7. Under Article 86(3) an accused may be charged as AWOL from his or her "unit", "organization", or "place of duty at which he was required to be". "Unit" and "organization" are clear concepts and when alleged aver that the accused was not in the geographic place where the named military body was situated. If you were prosecuting an 86(3) case under the theory of absence from unit or organization, would you prefer that the unit or organization alleged be:

a. a company.

b. a battalion.

c. a brigade.

d. a division.

The correct answer is **a.** When 86(3) is alleged, you have to prove the accused wasn't present anywhere within the named military body. It is far easier to prove the accused was nowhere within the company -- than to prove he or she was nowhere within the much larger battalion, brigade, or division areas. The larger the organizational body, the more difficult proving the case becomes. Thus, informed prosecutors always prefer answer a., the company -- the smallest listed unit.

Reference: MCM, part IV, para. 10b(3) and c(7).

8. The phrase "place of duty at which he or she was required to be" under Article 86(3) sounds like the phrase "appointed place of duty" mentioned in Articles 86(1) and (2). Do they mean the same thing?

a. Yes.

b. No.

The correct answer is **b.** "Appointed place of duty" in 86(1) and (2) refers to a specific, identifiable place -- for example, that latrine on the third floor of building 156 at Fort Benning which Skywalker didn't clean. "Place of duty at which he or she was required to be" in 86(3) conveys the broader concept of command, quarters, station, base, camp, or post. Pleading "place of duty at which he or she was required to be" under 86(3) is appropriate when an accused is not serving with his or her command but with a different military body. For example, a soldier from Fort Benning might be temporarily sent to Walter Reed Army Hospital in Washington, D.C. for in-patient treatment. Were that soldier to flee from the hospital, her absence would be from the hospital, "a place of duty at which she was required to be", not an absence from her organization or unit at Fort Benning.

Compare MCM, part IV, paras. 10b(1) and (2) with para. 10b(3).

9. "Specification: In that Private E-2 Janus E. Smith, U.S. Army, 4th Battalion, 3d Basic Training Brigade, Fort Jackson, South Carolina, did, on or about 4 January 199X, absent herself from her unit, to wit: the 4th Battalion, 3d Basic Training Brigade, Fort Jackson, South Carolina, and did remain so absent until on or about 23 March 199X." Which of the following statements is correct?

a. The specification is legally correct.

b. The specification is fatally defective in that the accused's company has been omitted.

c. The specification is defective in that the absence is not alleged to have been without authority. Nevertheless, a conviction will not necessarily be overturned if the accused entered a plea of guilty to the defective specification.

d. The specification is fatally defective in that it alleges an absence in excess of 30 days, and absences of such a length may only be charged as desertion.

The correct answer is **c.** While an individual AWOL from a unit is frequently dropped from the rolls and is administratively labeled as a deserter after a 30 day absence, the criminal offense of AWOL is not limited to any specific amount of time. It is possible, for example, to have been AWOL in excess of 10 years. The failure to include in the specification the words "without authority", however, renders the specification defective. Until very recently, a specification that failed to allege "without authority" was fatally defective. In United States v. Watkins, 21 M.J. 208 (C.M.A. 1986), the court held that failure to allege "without authority" did not constitute grounds for reversal where, during the providence inquiry, all elements of the offense were discussed and the accused admitted his guilty to each and every element. Did you consider answer b.? While it is better practice to charge an absence from the accused's company, unit designation is not legally required.

Reference: MCM, part IV, para. 10b(3).

10. The crime of unauthorized absence is complete the moment the accused [select one]:

a. Leaves the unit with authority.

b. Leaves the unit without authority.

c. Is arrested by law enforcement officers.

d. Returns to the unit.

The correct answer is **b.** An unauthorized absence is not a continuing offense but is a completed criminal offense at the moment of inception. Answer a. is incorrect because when the accused leaves the unit WITH authority there is no unauthorized absence at all. Answers c. and d. are wrong because again AWOL is completed at the moment of INCEPTION. The circumstances of return to military control add nothing to the fact that the crime has been committed.

Reference: MCM, part IV, para. 10c(8).

11. A soldier may voluntarily terminate AWOL status by which of the following?

a. Going on a military installation to use the PX.

b. Telephoning the company commander and advising the commander of his or her location.

c. Surrendering himself or herself to an FBI agent who is seeking the absentee, and informing the agent of his or her AWOL status.

d. None of the above.

The correct answer is **c.** In order for a servicemember to terminate his or her AWOL voluntarily, the soldier must submit to military authority. Such submission usually entails surrendering oneself to a military official or federal law enforcement agent who is seeking the absentee and notifying the official or agent of the AWOL status. In choice c., the accused surrendered to a federal law enforcement agent and advised the agent of the AWOL status -- thus terminating the offense. In answer b. there is no actual surrender -- just notification. Answer a. is wrong as mere casual presence on a military installation does not terminate an AWOL.

Reference: MCM, part IV, para. 10c(10).

12. Private (E-2) Jones turned himself in to Sergeant (E-5) Doe, the local Air Force recruiter in Cleveland, Ohio, telling her that he was AWOL from his unit in Germany. The recruiter told the Army Private to "get lost". Private Jones returned home and remained there for another six months before being apprehended by military police. Military police authorities returned Private Jones to his unit in Germany. Which of the following statements is true?

a. The AWOL wasn't terminated prior to apprehension because the Air Force recruiter was not empowered to accept a returning Army absentee.

b. The AWOL is terminated only when Private Jones is physically returned to his unit in Germany.

c. The AWOL terminated at the time Private Jones tried to surrender to the recruiter.

d. The AWOL terminated only at the time of apprehension.

The correct answer is **c**. The soldier submitted himself to military authority and notified the recruiter of his status. That ended the AWOL. If the military official or federal law enforcement officer refuses to take custody, the period of AWOL nevertheless terminates -- providing, of course, there was a bona fide offer to submit to military authority and the intent to do so. In the facts of this case, the prosecution may be able to charge and prove a second AWOL -- beginning some reasonable time after Jones left the recruiter's office until he was apprehended.

Reference: MCM, part IV, para. 10c(10)(a).

13. Specialist Jones turns himself in to the local civilian police and tells them he is AWOL. The police incarcerate Jones and immediately notify the nearest Army post of his presence. Authorities at the Army post ask civilian police to keep him in custody until military police can physically escort Jones back to post. Because of a lack of vehicles, the military police delay a week before removing Jones from civilian confinement. Which of the following is correct?

a. The AWOL terminated when the military police picked up Jones from the civilian police.

b. The AWOL terminated when civilian police notified the Army of Jones presence and the Army asked that Jones be detained.

c. The AWOL terminated when Jones surrendered to the civilian police.

d. The AWOL terminated when Jones actually returned to his assigned unit.

The correct answer is **b.** Jones's AWOL ended when civilian police notified the military of his presence and the Army asked that Jones be held. Surrendering to civilian police isn't sufficient because they are not military officials or federal law enforcement authorities who are seeking the ABSENTEE -- nor are they agents for the military or the "feds". However, once the Army asks the civilian police to detain Jones, the civilian police have become agents for the military, and Jones is in military custody.

Reference: MCM, part IV, para. 10c(10)(e).

14. The maximum legal punishment for the offense of absence without leave is based upon which of the following?

a. The grade of the accused.

b. The circumstances surrounding the absence.

c. The duration of the absence.

d. Both b and c.

The correct answer is **d.** Duration of the absence and the circumstances of the absence are the primary factors in determining the maximum legal punishment for absence without leave. Part IV, para. 10e of the Manual for Courts-Martial indicates that the maximum penalties are:

*** not more than three days **** confinement for one month, forfeiture of 2/3 pay per month for one month, and reduction to the lowest enlisted grade.

*** more than three days, but not more than 30 days **** confinement for six months, forfeiture of 2/3 pay per month for six months, and reduction to the lowest enlisted grade.

*** more than 30 days **** confinement for one year, total forfeiture of all pay and allowances, a Dishonorable Discharge, and reduction to the lowest enlisted grade.

** more than 30 days and terminated by apprehension **** confinement for 18 months, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and a Dishonorable Discharge.

** from guard or watch **** confinement for 3 months, forfeiture of 2/3 pay per month for 3 months, reduction to the lowest enlisted grade.

** from guard or watch with intent to abandon **** confinement for 6 months, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a Bad Conduct Discharge.

** with intent to avoid maneuvers or field exercises **** confinement for 6 months, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a Bad Conduct Discharge.

15. A soldier is charged with an unauthorized absence from 11 January 199X to 19 February 199X. The prosecution's proof at trial shows an unauthorized absence from 11 January 199X to 22 February 199X. The trier of fact can return which of the following findings?

a. Find the accused guilty of AWOL from 11 January 199X to 22 February 199X.

b. Find the accused guilty of AWOL from 11 January 199X to 19 February 199X.

c. Acquit the accused because of a fatal variance between the charge and proof.

d. None of the above.

The correct answer is **b.** In making findings of guilty, the fact finder may decrease the period of absence alleged in the specification but cannot increase the length. Even though the maximum punishment is not enhanced, the length of absence cannot be increased in the findings beyond that period charged. There is a variance in the length of the alleged and proved AWOL, but the accused has no complaint if the prosecution holds him or her responsible for a lesser period than the actual absence.

16. An accused is charged with AWOL from 3 May 199X until 10 June 199X. At trial, the prosecution, through the use of official records, is able to prove the inception date of the absence but cannot prove a termination date. The court may do which of the following?

a. Must acquit the accused.

b. May convict the accused of a one-day AWOL -- day of inception.

c. May convict the accused of the entire period alleged since proof of an inception date creates a presumption of continued absence.

The correct answer is **b.** The court is not required to acquit the accused but may, by exceptions and substitutions, find the accused guilty of a one-day AWOL, the inception date. So long as the prosecution provides an inception date and proves absence either on that inception date alleged OR ON ANY DAY DURING THE PERIOD OF THE ALLEGED ABSENCE, the court can convict the accused of a one-day AWOL. Answer c. is incorrect as no presumption of continuing absence is possible in this case because there is no termination date. In the next question we will explore the working of the presumption of continuing absence.

17. When the prosecution proves an inception date and a later termination date for an unauthorized absence, an inference arises that the absence was continuous between the two dates. True or False?

a. True.

b. False.

The correct answer is a. The defense can, of course, overcome this inference, but proof of inception and termination dates is sufficient to show a continuous absence between the two dates. Were this not so, imagine the difficulty of proving a continuous absence of any substantial period of time.

18. Private Smith is charged with AWOL from 7 November 199X to 27 November 199X. The prosecution establishes the inception and termination dates. The defense counsel proves that the accused returned to the unit at noon on 15 November and was put back to work by the company commander, but slipped away from the unit again later that evening. What is the longest absence for which Smith may be convicted?

a. Smith must be acquitted because of a variance between the charge and the proof.

b. Smith can be found guilty of two AWOL's; from 7 November to noon on 15 November, and from the evening of 15 November to 27 November.

c. Smith can be found guilty of a one day AWOL -- 7 November.

d. Smith can be found guilty of AWOL from 7 November to noon 15 November.

e. Smith can be found guilty of AWOL from the evening of 15 November to 27 November.

NOTE: More than one correct answer is possible.

Answer **b** is correct. The law of AWOL permits charging one long period of AWOL and ultimately finding the accused guilty of two lesser periods of AWOL encompassed by the original charge. Where this takes place at trial, though, the maximum permissible punishment may not be increased. See United States v. Francis, 15 M.J. 424 (C.M.A. 1983). Although answer b reflects the most severe findings, answers c, d, and e are also correct: when an inception date is proven, the accused may be found guilty of that one day AWOL; obviously, the court could find the accused guilty of only the initial period of AWOL; and finally, the court could find the accused guilty of only the second period of AWOL rather than both.

Reference: MCM, part IV, para. 10c(11).

19. PFC Doe was AWOL from her unit from 0800 on 22 March 199X to 0830 on 25 March 199X. At her court-martial, the specification alleged an absence from "22 March 199X" to "25 March 199X". Which of the following is true?

a. The maximum penalty, on conviction, includes confinement for one month, reduction to E1, forfeiture of two-thirds pay per month for one month.

b. The maximum penalty, on conviction, includes confinement for six months, reduction to E1, and forfeiture of two-thirds pay per month for six months.

c. Absence of less than 24 hours is computed for punishment purposes as an absence for one day.

d. If the hours of departure and return are not alleged, they are presumed to be the same.

e. Answers a., c., and d. are true.

f. Answers b., c., and d. are true.

The correct answer is **e.** Answers a., c., and d. are all true. This question asks what is the maximum penalty for the alleged AWOL. If the actual length of absence exceeds the period alleged, that is unfortunate for the prosecution; it is the alleged period that controls the penalties. What period is alleged when time of departure and time of return are not specified in the allegation? The time of departure and return are presumed to be the same. Thus, when as here the specification alleges absence from "22 March" to "25 March", the time of going and returning is presumed to be the same, and the period alleged is three days. The maximum punishments in part IV, paragraph 10e(2) of the Manual for Courts-Martial advises that the maximum penalty for an AWOL of "not more than 3 days" is confinement for one month, forfeiture of two-thirds pay per month for one month, and reduction to E1. Had the prosecution alleged in the pleading the actual times of departure and return, then the period of absence would be three days and 30 minutes and the maximum penalty would include confinement for six months, forfeiture of two-thirds pay per month for six months, and reduction to E1.

References: MCM, part IV, paras. 10c(9) and e(2).

20. Private (E-1) Jones fled from his unit on 6 January 199X; he returned on 9 June 199X. At court-martial, Jones is charged with AWOL from 10 February 199X until 9 June 199X. Defense counsel at trial shows Jones's flight commenced on 6 January instead of 10 February as alleged. The prosecution concedes that the alleged inception date is in error, and that the actual inception of the absence occurred before the alleged period. Which of the following is true?

a. Jones may be found guilty of AWOL from 10 February to 9 June.

b. Jones must be acquitted because the prosecution cannot establish an inception date within the period alleged.

The correct answer is a. This is an especially tough question. While the defense has a neat argument, the court can convict the accused of the AWOL as alleged, even though an earlier inception date is shown. For this limited purpose, appellate courts have held AWOL complete at its inception AND a continuing offense. Confused? You have a right to be. For solace, consult Lederer, "Absence Without Leave - The Nature of the Offense," The Army Lawyer, March 1974, at page 4.

21. Next let's discuss the offense of desertion under Article 85.

Desertion exists when [select one]:

a. Any member of the armed forces quits his or her unit, organization, or place of duty with intent to avoid hazardous duty or shirk important service.

b. Any member of the armed forces without authority goes or remains absent from his or her unit, organization, or place of duty with intent to remain away therefrom permanently.

c. Both a. and b.

d. Neither a. nor b.

The correct answer is **c.** Article 85 lists four different forms of desertion, two of which are specified in this problem. The two forms listed here are the most common varieties you will see in the field.

Reference: Art. 85, UCMJ; MCM, part IV, para. 9a.

22. Termination of desertion by apprehension [select one]:

a. Is a necessary element of the offense of desertion.

b. Is an aggravating factor which, if alleged and proven, increases the maximum punishment for the offense of desertion.

c. If alleged in the specification is prejudicial error because of its tendencies to inflame the passions of the military "jury".

d. None of the above.

The correct answer is **b**. Termination by apprehension, when alleged and proven beyond a reasonable doubt at trial, is an aggravating factor that permits an increased maximum punishment; it increases the maximum confinement from 2 to 3 years. Recall that termination is relevant to calculation of the maximum penalty for AWOL as well.

Reference: MCM, part IV, para. 9b(1) and e(2)(a).

23. The intent to remain away permanently, an element of the most common form of desertion [select one]:

a. Must precede the period of the unauthorized absence.

b. Must coincide with the accused's unauthorized departure.

c. Must occur at the time of the accused's unauthorized departure or at some time during the ensuing absence.

d. Must occur throughout the entire period of unauthorized absence.

The Manual for Courts-Martial at part IV, para. 9c(1)(a)(i), answers this one, and the correct answer is **c.** To be guilty of this form of desertion, the accused must have the intent to remain away permanently EITHER at the time of inception of the unauthorized absence OR at some time during the period of absence. Consequently, a soldier who leaves without authority and only at some later time decides never to return can be found guilty of desertion for the entire period of the absence -- even though the accused may have intended to return when the AWOL began.

24. In cases of desertion with intent to remain away permanently in violation of Article 85, the intent element may be proved by [select one]:

a. Statements of the accused.

b. Length of absence plus other factors.

c. Circumstantial evidence such as disposal of military uniforms and identification papers.

d. All of the above.

The correct answer is **d.** Answers **a.**, **b.**, and **c.** are all correct. Intent may be proved by any of these forms of direct and circumstantial evidence. Remember, however, that length of absence alone isn't enough to establish intent to remain away permanently. Something more -- sometimes only slightly more -- is needed.

Reference: MCM, part IV, para. 9c(1)(c).

25. Desertion differs from AWOL in which of the following ways:

a. Desertion requires an absence in excess of one year, but AWOL does not.

b. Desertion requires proof beyond a reasonable doubt of the accused's specific intent, but AWOL does not.

c. The longer the absence the greater the penalty for desertion, but not for AWOL.

d. Both a. and c.

The correct answer is **b**. No specific length of time distinguishes a period of AWOL from that of desertion. While a very long absence may be circumstantial evidence of an intent to remain away permanently, desertion may be established on a very short absence -- if other proof of intent is present. It is the specific intent element which distinguishes desertion from AWOL. In desertion, the intent (to remain away permanently, to avoid hazardous duty, etc.) must be alleged in the specification and proved beyond a reasonable doubt at trial. Without proof of intent beyond a reasonable doubt, the lesser included offense of AWOL may be established at trial.

Compare MCM, part IV, para. 9b(1) with para. 10b(3).

26. Private Smith went AWOL from his unit on 2 October. Though he initially intended to return, by 5 November he had decided to give up the Army forever. This decision was reversed by military police who apprehended him on 6 November. At his ensuing court-martial, Smith was charged with desertion terminated by apprehension, from 2 October to 6 November. The trial counsel established the inception date of 2 October, the subsequent formulation of an intent to remain away permanently, and the fact of apprehension, but neglected to establish either the date of the intent or the date of the apprehension. The court-martial may convict Private Smith of which of the following?

a. Desertion terminated by apprehension from 2 October to 6 November.

b. AWOL for one day, 2 October.

c. Desertion for one day, 2 October.

d. AWOL terminated by apprehension.

The correct answer is **b**. If the prosecution proves an inception date but no termination date, there is no presumption of continuing absence and only a one day AWOL, the day of inception, is established. If the intent to remain away permanently occurred during that one day, then one might have a one day desertion. But here the intent was formulated at an indefinite time subsequent to that day of departure. One can get no further than a one day AWOL.

Reference: MCM, part IV, para. 10c(8).

27. The next three questions concern Staff Sergeant (E-6) Doe who, in 199X, departed from his unit without authority in order to care for his sick mother in Quebec, Canada. Several months later, Sergeant Doe secured a good job in Canada and told friends that he decided to remain permanently with his mother. He also told his employer that he was not going to return to the Army. Several years later Doe returned to the United States to visit friends and was apprehended for desertion. At his court-martial, he was charged with desertion terminated by apprehension. If at that court-martial the prosecution fails to prove termination by apprehension [select one]:

a. Doe may only be convicted of AWOL.

b. Doe may nevertheless be convicted of desertion.

c. Doe must be acquitted.

The correct answer is **b.** Failure to establish the aggravating circumstance of termination by apprehension is not fatal to proof of desertion. All the prosecution loses is the possibility of one more year of confinement on the maximum penalty.

Reference: MCM, part IV, para. 9e(2).

28. Several years of absence from the Army is sufficient in itself to establish the intent to desert. True or False?

a. True.

b. False.

The correct answer is **b**. Length of absence alone is not enough to show circumstantially an intent to remain away permanently. A dozen appellate decisions have made that point.

Reference: MCM, part IV, para. 9c(1)(C)(iii).

29. At the Doe court-martial, in order to prove intent to remain away permanently, the prosecutor should introduce evidence regarding which of the following?

a. Length of absence.

b. Residence in Canada.

c. Accused's statements to his friends and employer.

d. Termination of the absence by apprehension.

e. All of the above.

The correct answer is **e.** All items of evidence listed should be introduced. Each contributes to a showing of Sergeant Yelton's intent to remain away permanently.

Reference: MCM, part IV, para. 9c(1)(c)(iii).

30. Let's discuss the offense of missing movement under Article 87, UCMJ: Which of the following is not an element of the offense of missing movement under Article 87?

a. The accused was required in the course of duty to move with a certain ship, aircraft, or unit.

b. The accused knew of the prospective movement of the ship, aircraft, or unit.

c. At a certain time and place the accused missed the movement of the ship, aircraft, or unit.

d. The accused remained absent until a certain, later time and date.

e. The accused missed the movement through neglect or design.

f. (If the time of the prospective movement was uncertain) The movement was missed as the proximate result of the intentional or negligent conduct of the accused.

The correct answer is **d**. No termination date is required for the offense of missing movement. In a sense, this crime is a more serious form of "failure to repair."

Reference: MCM, part IV, para. 11b.

31. There are two forms of missing movement: missing movement though neglect and missing movement through design. "Through design" means what?

a. Failure to exercise the care or attention that is appropriate under similar circumstances to assure presence at the time of a scheduled movement.

b. Intentionally doing an act, knowingly and purposely, specifically intending to miss the movement.

c. Reckless disregard for the predictable consequences of an act.

The correct answer is **b.** Answer a. is the definition of through neglect, a simple negligence standard. Answer b. correctly defines through design. Missing movement through neglect is a lesser included offense of missing movement through design. Through design carries a maximum penalty of a dishonorable discharge, total forfeitures, and confinement for two years; the maximum for through neglect is a bad conduct discharge, total forfeitures, and confinement for one year.

References: MCM, part IV, paras. 11c(3), (4), and 11e.

32. The word "movement" in the offense of missing movement includes which of the following?

a. A unit deploying permanently to a war zone.

b. A unit going to the rifle range on post.

c. A unit going on a two day field exercise on the other side of post.

d. A unit going to a one month field exercise at a point 100 miles away.

e. Answers a. and d. above.

The correct answer is **e.** Both a long training exercise located some substantial distance away (answer d.) and a permanent deployment to a war zone (answer a.) qualify as a "movement". Movement does not include practice marches of short duration with a return to the point of departure nor does it include minor changes in the location of a unit such as from one side of a post to another.

Reference: MCM, part IV, para. 11c(1).

33. Failure to go to an appointed place of duty is a lesser included offense of both missing movement through neglect and missing movement through design. True or False?

a. True.

b. False.

The correct answer is **a**.

Reference: MCM, part IV, para. 11d.

34. Private Jones flew home on leave for 30 days. When she went to the airport for the return flight, her purse was snatched and her wallet and airline ticket taken. Jones lacked money to buy another ticket, borrowed cash from the local Red Cross, and when she finally returned to her military base by bus, she was two days "over" her leave. If the above facts are accepted as true, a court-martial would [select one]:

a. Find Private Jones guilty of a two day AWOL because she had an absolute responsibility to be back at her unit when the leave expired.

b. Find Private Jones guilty of a two day AWOL because it was not physically impossible for her to return on time; there was an empty seat on the flight back.

c. Acquit Private Jones of AWOL because she was unable to return on time through no fault of her own.

In the facts presented by the question, the correct answer is **c.** Both impossibility and inability are defenses to unauthorized absences. Impossibility would be a good defense for Rippee if she had caught the flight and that flight had been hijacked and detained by a foreign government; it would be literally impossible for her to return. Short of impossibility, the law recognizes the defense of inability - inability to be present through no fault of the accused's own.

Reference: MCM, part IV, para. 10c(6).

35. Lieutenant Doe was given twenty days leave before he was due to report to Thule, Greenland for arctic training. On leave in Phoenix, Lieutenant Doe could not bring himself to depart and remained over his twenty days. Overcome by remorse and slightly sunburned on the 30th day after his leave commenced, Doe flew to New York to catch a connecting flight to Greenland. At JFK airport, Doe suffered an appendicitis attack, was hospitalized, and underwent surgery. Doe immediately flew to Thule after his doctor advised it was safe to travel, and reported there on the 60th day after his leave commenced. In fact, Doe's doctor was too cautious, and Doe could have returned on the 55th day. Which of the following is true?

a. Doe was AWOL from the 21st day to the 30th day only. His subsequent inability to return was due to no fault of his own -- serious illness and poor medical advice.

b. Doe was AWOL from the 21st day to the 30th day and from the 55th day thru the 59th day. While Doe's term of valid illness tolls the AWOL, he was in fact not unable to return on the 55th day and thereafter.

c. Doe was AWOL from the 21st day thru the 59th day; neither the defense of inability nor impossibility tolls the running of an unauthorized absence for one already in an AWOL status.

The correct answer is **c**. Of course, illness and other reasons that may have prolonged the absence are admissible in extenuation and mitigation.

Reference: MCM, part IV, para. 10c(6).

36. A soldier stationed at Fort Benning, Georgia, decided to fly to Atlanta for a weekend. He negligently took the wrong plane and arrived instead in Washington, D.C. Having arrived in Washington, he lacked enough money for the return flight to Fort Benning and remained in Washington for several days beyond his leave before he was able to arrange for his return to Benning. Which of the following is true?

a. This soldier has a defense of impossibility or inability.

b. This soldier has no good defense because the mishap was foreseeable and due to his own fault.

c. This soldier's misfortune is a factor to be considered in the sentencing phase of his trial.

d. Both b. and c. above.

e. Both a. and c. above.

The correct answer is **d.** These are the facts of United States v. Mann, 12 C.M.R. 367 (A.B.R. 1953). Second Lieutentant Mann was convicted of AWOL because his misfortune was foreseeable and due to his own fault. The sad story may be told in extenuation and mitigation in order to persuade the court to return a lighter sentence, however.

37. On the 28th day of his 30 day leave, Specialist Smith was arrested and detained by civilian police for murder. Smith was brought to trial in civilian court, and a verdict was returned 100 days after the expiration of his leave. Which of the following is true?

a. If Smith was found guilty, he was in an AWOL status for 100 days.

b. If Smith was acquitted, he was in an AWOL status for 100 days.

c. If Smith was found guilty, he was in an AWOL status for 0 days.

d. If Orestes was acquitted, he was in an AWOL status for 0 days.

e. a. and b. are true.

f. a. and d. are true.

g. b. and c. are true.

The correct answer is **f.** An accused who is involuntarily held over his leave by civilian authorities has a good defense of impossibility if he is subsequently acquitted or released without a conviction. If he is convicted, however, the time beyond his leave is due to his own fault, and he is in an AWOL status.

Reference: MCM, part IV, para. 10c(5).

38. Two days into an AWOL, Private Jones was arrested and detained by civilian police for auto theft. Tried in civilian court, Jones's verdict was announced 40 days after his arrest. Which of the following is true:

a. If Jones was found guilty, he was in an AWOL status for 42 days.

b. If Jones was acquitted, he was in an AWOL status for 42 days.

c. If Jones was found guilty, he was in an AWOL status for 2 days.

d. If Jones was acquitted, he was in an AWOL status for 2 days.

e. a. and b. are true.

f. a. and d. are true.

g. b. and c. are true.

The correct answer is **e.** If one is in an AWOL status, that status is not changed by arrest and civilian detention pending a trial result -- even if that result is an acquittal.

Reference: MCM, part IV, para. 10c(5).

39. The following two questions explore the case of Private Smith. She departed her unit for 14 days of authorized leave on 1 May. While preparing to return on 14 May she became ill and could not return to her unit. She did not telephone her commander regarding this illness. Well again on 25 May, she started toward her unit but was apprehended by civilian police and detained on suspicion of larceny. Civilian authorities having decided not to prosecute, she was returned to the military on 30 May. With regard to the period 15 May to 25 May which of the following is true?

a. Smith has no valid defense.

b. She would have had a defense had she informed her unit of the illness.

c. She has a valid defense.

d. None of the above.

The correct answer is **c.** Recall that when a soldier fails to return at the proper time because of physical inability to do so, that inability -- if not due to the soldier's own fault or foreseeable, is a defense to the resulting absence. While Private Smith could have helped her case considerably by telephoning her unit concerning the illness, such notice is not necessary for the defense in inability.

Reference: MCM, part IV, para. 10c(6).

40. With regard to the period 25 May to 30 May, which of the following is true?

a. If Smith was AWOL at the time of her arrest, her time in civilian custody will be a continuation of the AWOL status.

b. If Smith was AWOL at the time of her arrest, her time in civilian custody will be a continuation of the AWOL status only if she is convicted; if she is acquitted or not brought to trial, the period in the civilian slammer will not be AWOL time.

c. If Smith was not AWOL at the time of her arrest, her time in civilian custody will be a period of AWOL if the military proves she committed the offense for which she was confined and later released without trial.

d. a. and c. are true.

e. b. and c. are true.

The correct answer is **d.** Answer a. is true because if one is AWOL when arrested by civilian authorities, the AWOL status continues regardless of what happens in ensuing civilian proceedings; not even an acquittal, as is erroneously suggested in b., will excuse the period. Answer d. is true because if one is not AWOL when arrested, ensuing time in civilian detention is not AWOL time unless one is eventually convicted or the military proves she was guilty of the offense for which she was detained.

Reference: MCM, part IV, para. 10c(5).